

DEPARTMENT OF THE ARMY
Washington, D.C. 20310

Honorable

Speaker of the House of Representatives

Dear Mr. Speaker:

There is forwarded a draft of proposed legislation "To exempt certain contracts with foreign contractors from the requirement for an examination of records clause."

This proposal is a part of the Department of Defense Legislative Program for the 89th Congress, and the Bureau of the Budget has advised that it has no objection to the submission of this proposal for the consideration of the Congress. Similar proposals were introduced in the 86th and 87th Congresses under H. R. 11824 and H. R. 5163, respectively. As to each of those bills, the Comptroller General recommended certain changes which have now been incorporated in this proposal. The Department of the Army has been designated as the representative of the Department of Defense for this legislation. It is recommended that this proposal be enacted by the Congress.

Purpose of the Legislation

The purpose of this legislation is to exempt certain contracts between the United States of America and foreign contractors, including foreign governments and foreign subcontractors, from the requirement for an examination of records clause when such exemption would serve the best interests of the United States. Section 2313(b) of Title 10, United States Code, Section 304(c) of the Federal Property and Administrative Services Act of 1949, as added by the Act of October 31, 1951 (65 Stat. 700; 41 U.S.C. 254(c)), and Section 3(b) of the Act of August 28, 1958 (Public Law 85-804; 72 Stat. 972; 50 U.S.C. 1433(b)), require that negotiated contracts contain a provision entitling the Comptroller General of the United States and his representatives to examine any books, documents, papers, or records of the contractor or any of his subcontractors that directly pertain to, and involve transactions relating to, such contracts. The proposed legislation amends each of these sections so as to provide that such a provision may be omitted from contracts with foreign contractors or foreign

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subcontractors, including foreign governments if the agency head determines that the omission will serve the best interests of the United States, provided that the Comptroller General or his designee concurs in such a determination in cases where the clause is to be omitted from contracts or subcontracts with contractors or subcontractors other than a foreign government or its agencies, or foreign contractors or subcontractors that are precluded by the laws of the country involved from making their records available. In addition, the proposed amendments of Section 2313 of Title 10, United States Code, and Section 3(b) of the Act of August 28, 1958, supra, provide that the determination to omit the provision for an examination of records clause from a contract shall be submitted in writing to the General Accounting Office with the contract to which it applies. Such a provision is not necessary in the case of the amendment of Section 304(c) of the Federal Property and Administrative Services Act of 1949, supra, since Section 307(c) of that Act (63 Stat. 396; 41 U.S.C. 257 (c)) currently contains such a requirement.

The present requirements for the inclusion of an examination of records clause have resulted in difficulty and delay in placing contracts with foreign contractors and foreign subcontractors, and in one instance it resulted in a failure to accomplish procurement of a vitally needed item. Such difficulties and delays are particularly evident, and procurement is especially hampered, in contracting with foreign governments or agencies thereof, since the requirements for the examination of records clause involve a derogation of sovereign rights.

Past and current experience indicates that some foreign contractors and subcontractors are reluctant to permit the examination of their records and accounts by United States officials. Cases wherein delays in contracting for needed supplies and services were encountered after prolonged negotiations have involved the Nippon Telegraph Telephone Public Corporation for broadcasting, telecommunications services and maintenance work; the Japanese National Railways and the Ministry of Transportation (Japan); the Japan Broadcasting Corporation; Nagoya Stevedoring Contractors in Japan; Netherlands Postal and Telecommunications Administration; Belgium Regie des Telephones Et Telegraphes; Deutsche Bundespost; and the Deutsche Bundesbahn. In each of these cases the United States is in need of supplies or services that are obtainable from a single source of supply and thus is limited in its ability to demand contractual provisions which are not favorably considered by another sovereign or an individual contractor subject to the jurisdiction of such sovereign. Although the Department of Defense completely favors the need for a contractual right to examine the contractor's records, there are

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cases in which it must be recognized that acquisition of certain supplies and services necessary to the accomplishment of a military mission is paramount to the need for audit of the contract under the examination of records clause. It is in these cases that the proposed legislation will provide an expedient particularly where time is of the essence. A similar need for exemption from an examination of records clause in such circumstances has been recognized by the Congress in other laws. For example, Section 166 of the Atomic Energy Act of 1954 (68 Stat. 951; 42 U.S.C. 2206) exempts contracts with foreign governments and foreign producers from the requirements for the inclusion of the examination of records clause provided for therein. A similar provision is also contained in the Foreign Assistance Act of 1961 (Public Law 87-195; 75 Stat 454; 22 U.S.C. 2393). Under Public Law 87-653 (76 Stat 528; 10 U.S.C. 2306) the head of an agency may waive, in exceptional cases, requirements for a certification that the cost or pricing data submitted by the contractor was accurate, complete, and current. The General Accounting Office has reviewed the proposed legislation and interposes no objection.

Cost and Budget Data

The enactment of the proposal would not cause an increase in the budgetary requirements for the departments and agencies concerned.

Sincerely,

2 Incl

1. Draft of legislation
2. Sectional Analysis

Stephen Ailes
Secretary of the Army